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In The

Supreme Court of the United States

October Term, 1997

NATHANIEL JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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A. THE LANGUAGE AND STRUCTURE OF SECTION 2119 DO NOT ESTABLISH A CONGRESSIONAL INTENT THAT SERIOUS BODILY INJURY BE TREATED AS A FACTOR FOR CONSIDERATION BY THE SENTENCING COURT, RATHER THAN AS AN ELEMENT OF THE OFFENSE TO BE PLEADED AND PROVED TO THE JURY

Respondent argues that the language and structure of Section 2119 establish that serious bodily injury was intended to be merely a sentencing factor. As to the language, respondent points to the use of the passive "if serious bodily injury results," rather than a more active verb form. Brief for the United States, pp. 17-18, 27. However, it is not uncommon for Congress to use passive language in establishing the infliction of serious bodily injury as an element of a federal offense. *See, e.g.*, 18 U.S.C. § 1153(a) ("resulting in serious bodily injury"); 18 U.S.C. § 1959(a) (same); 18 U.S.C. § 2332(c)(2) ("with the result that serious bodily injury is caused"); 18 U.S.C. § 2332b(a)(1)(A) ("resulting in serious bodily injury"). The use of a particular verb form is not a reliable indicator of Congress's intent with regard to the issue before the Court.

As to the structure, respondent places great reliance on the point that subsections (1) through (3) of Section 2119 do not stand on their own. Brief for the United States, pp. 15-16. However, the first paragraph of the statute, ending in "shall," cannot stand on its own either. Unlike other statutory provisions defining criminal conduct, that paragraph does not state that the conduct described "shall be unlawful" (*e.g.*, 18 U.S.C. § 922(g)), "is prohibited" (18 U.S.C. § 42), or "shall be punished" in a particular way (*e.g.*, 18 U.S.C. § 2381) or as provided in another section or subsection (*e.g.*, 18 U.S.C. § 1751), nor

does it state that anyone engaging in the conduct described "is guilty of" a particular crime (*e.g.*, 18 U.S.C. § 1621 (perjury)) or of a particular class of crime (*e.g.*, 18 U.S.C. 2258 (Class B misdemeanor); 18 U.S.C. § 474 (Class B Felony)). Thus, the opening paragraph of the statute does not establish a federal criminal offense until it is combined with one of the co-equal subsections numbered (1) through (3). When so combined, the paragraph establishes three separate carjacking offenses, carrying differentiated penalties determined by particular circumstances of the crime.

In order to establish three separate offenses, respondent would require Congress to structure the statute as follows:

> (1) Whoever, possessing a firearm as defined . . . takes a motor vehicle that has been transported, shipped or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall be . . . imprisoned not more than fifteen years,
>
> (2) Whoever, possessing a firearm . . . takes a motor vehicle that has been transported, shipped or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, if serious bodily injury results, shall be imprisoned not more than 25 years.
>
> (3) Whoever, possessing a firearm . . . takes a motor vehicle that has been transported, shipped or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, if death results, shall be imprisoned for any number of years up to life.

Such a statutory scheme would have been unnecessarily cumbersome. The fact that Congress chose a simpler, more direct method to achieve its intended result provides no reason to deprive a defendant of significant constitutional protections.

In ascribing such great weight to the structure of the statute, respondent ignores the fact that Congress has utilized several different statutory schemes to incorporate the concept of bodily injury into federal criminal statutes. *See* Brief for Petitioner, p. 14. The absence of any consistent pattern in this regard counsels against undue reliance on the structure of Section 2119 as evidence of Congressional intent on whether serious bodily injury was to be an element of the offense to be pleaded and proved to the jury or merely a factor considered by the sentencing court.

Respondent also claims that Section 2119 "is structured very much like statutes that all would agree set out only sentencing factors," citing 8 U.S.C. § 1324(a) and 18 U.S.C. § 247. Brief for the United States, p. 18; *see also id.*, p. 9. There is no such agreement. Whatever the similarity of those statutes to Section 2119, petitioner vehemently disagrees that the two statutes set out *only* sentencing factors.

In fact, 18 U.S.C. § 247 resembles the hypothetical statute envisioned by the dissenting justices in *Monge* v. *California*, 118 S. Ct. 2246, 2255 (1998). Section 247 establishes a crime of intentionally defacing, damaging or destroying religious real property or intentionally obstructing, by force or threat, any person in the free exercise of religious beliefs (§ 247(a)-(c)), with a basic penalty of a fine or imprisonment for not more than one year or both (§ 247(d)(4)). The statute then increases the maximum sentence to 20 years where bodily injury to any

person results or a dangerous weapon, explosives or fire is used (§ 247(d)(3)); to 40 years if bodily injury results and fire or an explosive is used (§ 247(d)(2)); and to any term of years, life imprisonment, or the death penalty if death results or if the defendant's acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill (§ 247(d)(1)). It is difficult to conceive of a court holding that the operative facts of the crime that increase the statutory maximum punishment from 1 year, to 20 years, 40 years, life imprisonment or execution need not be pleaded in an indictment and proved to a jury beyond a reasonable doubt.

Similarly, 8 U.S.C. § 1324(a) establishes a crime of bringing in, transporting, or harboring certain aliens (§ 1324(a)(1)(A)), with a basic maximum sentence of 5 years (§ 1324(a)(1)(B)(ii)). The statute then increases the maximum penalty for certain violations to 10 years when done for purposes of commercial advantage or private financial gain (§ 1324(a)(1)(B)(i)); for certain violations to 20 years where the defendant causes serious bodily injury or places in jeopardy the life of any person (§ 1324(a)(1)(B)(iii)); and for certain violations to any term of years or life imprisonment where death results (§ 1324(a)(1)(B)(iv)). Again, the operative facts of the crime that trigger an increase of the maximum penalty from 5 years to life either were intended to be treated as elements of an aggravated offense, or are constitutionally required to be so treated.

Thus, respondent's protestations notwithstanding, the language and structure of Section 2119 are too slender a reed upon which to base a decision to deny carjacking defendants the basic constitutional protections of grand

jury indictment, trial by jury, and proof beyond a reasonable doubt.[1]

B. UNLIKE RECIDIVISM, BODILY INJURY TO A VICTIM OF THE OFFENSE HAS NOT TRADITIONALLY BEEN RESTRICTED TO USE AT SENTENCING; RATHER, A VICTIM'S BODILY INJURY HAS HISTORICALLY BEEN AN ELEMENT OF AN AGGRAVATED FORM OF ROBBERY CARRYING A GREATER MAXIMUM SENTENCE

In an attempt to have this Court construe the carjacking statute within the rule of *Almendarez-Torres* v. *United States*, 118 S. Ct. 1219 (1998), respondent repeatedly states that bodily injury, like recidivism, has been a traditional basis for enhancing a defendant's sentence and is "as typical a sentencing factor as one might imagine." *See* Brief for the United States, pp. 9, 23, 25, 39, 43 (quoting *Almendarez-Torres*, 118 S. Ct. at 1224). This ignores the role that bodily injury has historically played in defining robbery offenses and misstates the import of *Almendarez-*

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[1] In reply to petitioner's reliance on the rule of lenity (Brief for Petitioner, pp. 30-31), respondent questions whether "defendants would be systematically favored" by requiring the government to plead and prove serious bodily injury (or death resulting). Brief for the United States, p. 35. However, as respondent elsewhere admits, such evidence would likely be admissible in any event "to show the use of 'force and violence.' " *Id.*, p. 44. In any event, any defendant who chooses not to avail himself of the right to require the government to plead and prove serious bodily injury (or death resulting) has procedural devices available to accomplish that goal. *See Almendarez-Torres*, 118 S. Ct. at 1243 (Scalia, J., dissenting).

Torres. Although physical harm to a victim has undoubtedly been a factor that judges have considered in determining what sentence to impose within the statutory range in a given case, such injury, unlike a defendant's criminal record, has not traditionally been *limited* to sentencing. State statutes have long incorporated the harm caused to a victim as an element of the offense of aggravated robbery with an increased sentence. *See* Brief for Petitioner, Appendix.[2] In *Almendarez-Torres*, the Court made it clear that recidivism's traditional use as a sentencing factor was important *only* because recidivism also *had not been traditionally used as an element of an offense*. After noting that a defendant's prior commission of a crime is "one of the most frequently found factors that affects sentencing" (118 S. Ct. at 1229), the Court went on to emphasize that there was "no statute that clearly makes recidivism an offense element. . . . "; *id.* at 1224;[3] *see also id.* at 1231 ("recidivism 'does not relate to the commission of the offense, but goes to the punishment only, and therefore . . . may be subsequently decided' ") (quoting *Graham* v. *Virginia*, 224 U.S. 616, 629 (1912); *id.* ("[A] charge under a recidivism statute does not state a separate offense, but goes to punishment only") (quoting *Parke* v. *Raley*, 506 U.S. 20, 27 (1992)); *id.* ("Congress reflecting this tradition, has never, to our knowledge, made a defendant's recidivism an element of an offense

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[2] Respondent mistakenly characterizes the appendix as setting forth "the state law of *assault*." Brief for the United States, p.21, n.8 (emphasis added).

[3] The Court noted that the one exception is a statute where the charged conduct would not otherwise be unlawful in the absence of the prior conviction, such as a statute that criminalizes a felon's possession of a firearm, citing 18 U.S.C. § 922(g)(1).

where the conduct proscribed is otherwise unlawful"); *see also United States* v. *Forbes*, 16 F.3d 1294, 1299 (1st Cir. 1994) ("proof of a defendant's prior felony convictions typically is the type of individual background information considered by the judge, *and not the jury*") (emphasis added). With this historical context, the Court concluded that Congress did not intend recidivism to be an element of an offense and that the Constitution did not require that recidivism be so treated. *See Almendarez-Torres*, 118 S. Ct. at 1224-1226 ; *id.* at 1231 ("to hold that the Constitution requires that recidivism be deemed an 'element' of petitioner's offense would mark an abrupt departure from a longstanding tradition of treating recidivism as 'go[ing] to the punishment only' ") (quoting *Graham*, 224 U.S. at 587-588).

Unlike recidivism, bodily injury has historically been used as an element of an aggravated form of a robbery offense. Numerous state statutes have set forth an aggravated version of robbery, with a greater maximum sentence, where the prosecution must prove to a jury beyond a reasonable doubt that the offense involved some type of bodily injury or physical harm to the victim of the offense. *See* Brief for Petitioner, Appendix. Thus, whereas the historical use of recidivism for sentencing purposes was cited by the *Almendarez-Torres* court as favoring an interpretation of the prior conviction element in 8 U.S.C. § 1326(b)(2) as merely a sentencing factor, the historical treatment of bodily injury as an element of the offense of aggravated robbery militates in favor of construing subsection (2) of § 2119 as setting forth an element of an aggravated carjacking offense.

Moreover, the nature of the particular factor here weighs heavily toward finding serious bodily injury to be an ingredient of a 25-year carjacking offense. In contrast

to recidivism, bodily injury is an often-disputed circumstance of the offense, one that is not readily verifiable and is best determined by a jury under the standards and protections accorded at trial. *See* Brief for Petitioner, pp. 15-19. In this regard, the Courts of Appeals have often construed other facts of an offense, which (like serious bodily injury) trigger a greater maximum penalty, to be elements of an aggravated offense. *See* Brief for Petitioner, p. 17 n. 12; *see also Aderhold* v. *Pace*, 65 F.2d 790, 791 (5th Cir. 1933) (amount of intoxicating liquor sold, which increased the maximum sentence, must be pleaded in indictment, because "to punish one for all of a crime where only a part of it is charged is to punish him without accusation," citing 1 Bishop's Cr. Pro. §§ 77, 80, 84).

Such treatment in no way restricts the Sentencing Guidelines' use of "bodily injury" as a factor that a sentencing court may consider in determining a defendant's guideline offense level and the defendant's ultimate sentence.[4] A circumstance or fact of a crime may be both an element of an offense and a factor that a court relies on in deciding to impose a more severe sentence. Often, a single statutory element, such as "serious bodily injury" in the carjacking statute, is divided into varying gradations in the sentencing guideline applicable to that offense so that the sentencing judge must make additional, precise findings on issues not resolved by a jury's general verdict of guilty. *See, e.g.*, § 2B3.1(c)(3) (in the guideline for robbery offenses, the enhancement for

[4] This Court has recognized that a fact regarding the offense that triggers an increase in the sentencing range may require different treatment under the Constitution than a fact used to fix a sentence within the sentencing range. *E.g., Edwards* v. *United States*, 118 S. Ct. 1475, 1477-1478 (1998).

bodily injury provides increases in the base offense level of two levels for "Bodily Injury," four levels for "Serious Bodily Injury," and six levels for "Permanent or Life-Threatening Bodily Injury"); *compare* 18 U.S.C. § 641 (felony theft of government property valued at more than $1,000 or more) *with* § 2B1.1(b) (various degrees of enhancement for amount of loss).[5] A sentencing judge may also consider the particular circumstances regarding an element of an offense in determining where within the guideline range to sentence a defendant and, with certain limits, whether to depart upward from the guideline range. *See, e.g.*, § 5K2.2 (upward departure for significant physical injury); *see generally* § 1B1.4 ("In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the . . . *conduct of the defendant*, unless otherwise prohibited by law.") (emphasis added). Thus, a decision that serious bodily injury is an element of an

[5] The jury's determination whether a particular element has been proven beyond a reasonable doubt is largely independent from the sentencing judge's decision whether and to what degree a particular aggravating sentencing factor has been shown to exist by a preponderance of the evidence. In a carjacking case, a jury's verdict that a defendant is guilty of carjacking with serious bodily injury would not control the court's decision under § 2B3.1(b)(3) whether to add just 4 levels for "Serious Bodily Injury" or 6 levels for "Permanent or Life-Threatening Bodily Injury" (or 5 levels for injury falling between the two categories). Similarly, a jury's verdict of guilty on a simple carjacking offense (without a finding of serious bodily injury) would not preclude the court from enhancing the defendant's sentence for some degree of bodily injury under the robbery guideline within the 15-year statutory maximum.

aggravated carjacking offense would in no way undermine the Sentencing Guidelines, as respondent seems to suggest. *See* Brief for United States, pp. 23-25. On the contrary, the Sentencing Commission has fully considered the varying degrees of this element's presence in defining the specific offense characteristics of the sentencing guideline applicable to carjacking.

In short, because bodily injury (unlike recidivism) has not traditionally been limited to consideration at sentencing, but rather has generally been incorporated into robbery statutes as an element of an aggravated version of the offense, this Court's decision in *Almendarez-Torres* is readily distinguishable on the issue presented herein.

C. THE FEDERAL ROBBERY STATUTES UPON WHICH THE CARJACKING STATUTE IS MODELED TREAT A FACT OF THE CRIME THAT INCREASES THE MAXIMUM PUNISHMENT AS AN ELEMENT OF AN AGGRAVATED ROBBERY OFFENSE

As respondent concedes, Congress looked to the other federal robbery statutes in its drafting of Section 2119. Brief for the United States, pp. 20-21 and fn. 8. Three of these statutes, all of which are placed (along with Section 2119) in Chapter 103 of Title 18 of the United States Code entitled "Robbery and Burglary," establish a particularized form of robbery,[6] and then divide the particularized robbery into a basic offense and one or more

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[6] The other two robbery statutes in Chapter 103 define general robbery offenses: Section 2111 (robbery within the special and territorial jurisdiction of the United States) and Section 2112 (robbery of personal property belonging to the United States). Three other sections within the chapter define

aggravated offenses. Thus, Section 2113(a) establishes the basic offense of bank robbery with a maximum penalty of 20 years; an aggravated version, where the defendant is shown to have assaulted any person or put any person's life in jeopardy by use of a dangerous weapon or device, carries a maximum penalty of 25 years (§ 2113(d)); and another aggravated version, where death results, has a maximum punishment of death or life imprisonment (§ 2113(e)). Section 2114 establishes the basic offense of postal robbery with a maximum penalty of 10 years; an aggravated version, where the defendant is shown to have wounded the victim or put his life in jeopardy by use of a dangerous weapon or is a recidivist, carries a maximum penalty of 25 years. Section 2118(a) establishes the basic offense of pharmacy robbery with a maximum penalty of 20 years; an aggravated version, where the defendant is shown to have assaulted any person or put in jeopardy the life of any person by use of a dangerous weapon or device, has a maximum penalty of 25 years (§ 2118(c)(1)); and another aggravated version, where the defendant is shown to have killed any person, carries a maximum penalty of life (§ 2118(c)(2)).

With regard to each of these particularized robbery statutes, the fact of the crime that increases the maximum penalty over that for the basic robbery offense has been held to be an element of the aggravated offense. Thus, assaulting another or putting another's life in jeopardy by use of a dangerous weapon or device has been held to be an element of the offense of aggravated bank robbery

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burglary offenses: Section 2115 (burglary of a post office), Section 2116 (burglary of a post-office car, steamboat or vessel), and Section 2117 (burglary of a railroad car, vessel, aircraft, etc.).

under Section 2113(d). *See, e.g., United States* v. *Ray*, 21 F.3d 1134, 1136-1139 (D.C. Cir. 1994); *see also* cases cited in Brief for Amicus Curiae National Association of Criminal Defense Lawyers, pp. 12-13.[7] Similarly, placing a postal worker's life in jeopardy by use of a dangerous weapon has been held to be an element of aggravated postal robbery under Section 2114. *See, e.g., United States* v. *Lawrence*, 699 F.2d 697, 701 (5th Cir.), *cert. denied*, 461 U.S. 935 (1983); *United States* v. *Crawford*, 576 F.2d 794, 798 (9th Cir.), *cert. denied*, 439 U.S. 851 (1978); *United States* v. *Davis*, 560 F.2d 144, 147 (3d Cir.), *cert. denied*, 434 U.S. 839 (1977). Finally, as to Section 2118, the Sixth Circuit has stated that "since the pharmacy burglary statute was modeled after the federal bank robbery statute . . . , we look to interpretation of that statute for guidance," and has approved the district court's instruction which defined the aggravating factor of assault or putting another's life in jeopardy by use of a dangerous device, which was necessary to increase the statutory maximum to 25 years. *United States* v. *Mills*, 1 F.3d 414, 419, 420 (6th Cir. 1993).

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[7] As noted by the D. C. Circuit in *United States* v. *Canty*, 469 F.2d 114, 127 (D.C. Cir. 1972):

> The federal bank robbery statute establishes a comprehensive scheme for prosecuting and punishing persons who rob federally-insured banks. The scheme subdivides the offense into a series of steps – a continuum running from entry with intent to rob, to robbery by force and violence, to robbery with the aid of a dangerous weapon, to robbery resulting in death or kidnapping. The scheme provides a penalty for each step of the offense, and increases the penalty as the offense becomes more aggravated. There are no gaps between the steps.

Given that Congress looked to the other federal robbery statutes in Chapter 103 in drafting Section 2119, and given that the facts of the crime which trigger an increase in the maximum penalties in each of the other particularized robbery statutes located in Chapter 103 have all been held to be elements of the offense, not mere sentencing factors, there is no reason that the infliction-of-serious-bodily-injury factor in Section 2119 should be treated otherwise.

D. THE LEGISLATIVE HISTORY SURROUNDING THE ENACTMENT OF SECTION 2119 DOES NOT PROVIDE RELIABLE EVIDENCE THAT CONGRESS INTENDED THAT CARJACKING DEFENDANTS BE DENIED TRADITIONAL CONSTITUTIONAL SAFEGUARDS ON THE QUESTION OF SERIOUS BODILY INJURY

Respondent recognizes that the legislative history surrounding the enactment of Section 2119 nowhere directly addresses whether serious bodily injury was intended to be a sentencing factor or an element of the offense. Indeed, respondent acknowledges that the entire discussion of the carjacking statute, as opposed to other sections of the Anti Car Theft Act, is best termed "brief." Brief for the United States, p. 22. This very limited and unfocussed legislative history is simply too "imprecise" to provide any reliable indication of congressional intent on the issue before the Court. *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries*, 512 U.S. 267, 280 (1994).[8]

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[8] In finding serious bodily injury to be a sentencing factor, the Ninth Circuit relied not only on the legislative history of the statute, but also its titles and subtitle. *See* J. A. 31. Respondent

E. THE 1994 AMENDMENTS CONFIRM THAT SERIOUS BODILY INJURY AND DEATH WERE MEANT TO BE ELEMENTS OF AGGRAVATED CARJACKING OFFENSES

In 1994 Congress simultaneously added the death penalty as an alternative punishment under Section 2119(3) where death results, and enacted the federal death penalty statute, 18 U.S.C. § 3591 *et seq.* Section 3591(a) authorized a death sentence, after a jury verdict of death in a penalty hearing under Section 3593, for a "defendant who has been found guilty of – . . . (2) any other offense for which a sentence of death is provided." Since carjacking is not "an offense for which a sentence of death is provided" unless a death has resulted, a defendant cannot be "found guilty" of that crime, and therefore be subjected to a subsequent penalty hearing on the question of death, unless the jury determining guilt or innocence as to the carjacking offense also determines whether death has resulted.

Thus, as a matter of statutory construction following the 1994 amendments, the fact of death resulting under § 2119(3) must be pleaded and proved to the jury as part of the carjacking prosecution.[9] Respondent suggests no reason why serious bodily injury under § 2119(2) should be treated differently. *See Almendarez-Torres*, 118 S. Ct. at

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has appropriately abandoned the latter argument. *See* Brief for Petitioner, pp. 20-21 and fn. 14.

[9] The alternative interpretation would require "an ornate, three-stage procedure," where the jury would determine guilt as to the carjacking charge, the judge would then conduct a hearing on whether death resulted, and the jury would then determine penalty in a sentencing hearing. *See United States* v. *Rezaq*, 134 F.3d 1121, 1136 (D.C. Cir. 1998), petition for cert. pending No. 97-9019 (filed May 7, 1998).

1239 n.3 (Scalia, J., dissenting). Petitioner agrees with respondent that "[t]here is no reason to suppose that Congress intended those amendments to *change* the proper interpretation of Section 2119." Brief for the United States, p. 30 (emphasis added). Rather, the 1994 amendments *confirm* that both death-resulting and serious bodily injury were originally intended to be elements of aggravated carjacking offenses when the statute was enacted by Congress in 1992.[10]

F. THE CONSTITUTION REQUIRES THAT SERIOUS BODILY INJURY BE DEEMED AN ELEMENT OF A § 2119(2) CARJACKING OFFENSE CARRYING A 25-YEAR MAXIMUM PENALTY

Relying largely on *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), and *Almendarez-Torres*, 118 S. Ct. 1219, respondent argues that there is nothing in the Constitution or this Court's cases that requires that a fact of an offense that significantly increases the maximum statutory penalty be treated as an element of that offense. Brief for United States, pp. 37-50. But neither *McMillan* nor *Almendarez-Torres* are controlling. The Court's decision in

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[10] Respondent's argument (pp. 33-35) that a 1996 amendment to Section 2119 confirms that serious bodily injury was not intended to be an element of the offense is meritless. The 1996 amendment, enacted to overrule the Court of Appeals decision in *United States* v. *Rivera*, 83 F.3d 542 (1st Cir. 1996), and appropriately entitled the Carjacking *Correction* Act of 1996, changed the definition of "serious bodily injury" in the carjacking law to include rape. Neither the amendment itself nor its limited legislative history addressed the statutory role of serious bodily injury, *i.e.*, whether, as originally defined or as later modified, it was meant to be an element of the offense, with the attendant constitutional safeguards, or merely a factor for consideration at sentencing.

McMillan is readily distinguishable because the statute involved there raised the statutory *minimum* penalty, not the *maximum*. As discussed in the Brief for Petitioner at pp. 37-40 and section B of this reply brief, the holding in *Almendarez-Torres* also is inapplicable here, because that case concerned the defendant's prior criminal record, rather than a fact relating to the commission of the charged offense. *See also Monge* v. *California*, 118 S. Ct. at 2257 (Scalia, J., dissenting) (noting that *Almendarez-Torres* and *Monge* do not address the open "question whether 'enhancements' that increase the maximum sentence and that do not involve the defendant's prior criminal history are valid"). Rather, the present case raises the issue left open in those cases, *i.e.*, whether a fact relating to the offense (rather than to the background of the offender) that significantly increases the statutory maximum sentence must be treated as an element of the offense.[11] For the reasons stated in the Brief for Petitioner at pp. 32-42, if the Court determines that serious bodily injury is not an element of the carjacking statute under principles of statutory construction, the Court must require that this fact that significantly raises the statutory maximum be treated as an element of the offense, a rule

[11] A finding of "serious bodily injury" or a resulting "death" certainly causes a significant increase in the statutory maximum sentence. As the statute read when applied to petitioner, the 15-year statutory maximum increased two-thirds to 25 years for serious bodily injury under section 2119(2) and to life imprisonment where death resulted under section 2119(3). As amended in 1994, section 2119(3) authorizes a maximum sentence of execution upon a finding that death resulted from the offense.

which the Court has long intimated is required by the Constitution. *See McMillan*, 477 U.S. at 87-88;[12] *Mullaney*

[12] Despite respondent's suggestion to the contrary, Brief for United States, pp. 38-40, *McMillan*'s reasoning cannot be divided into discrete "factors," so that the effect that a fact of the offense has on the statutory maximum is viewed as just one of many factors the Court considers in deciding whether the Constitution requires that the fact be treated as an element of the offense. Rather, a fair reading of the *McMillan* opinion reveals that an essential basis of the Court's ruling was that the fact in question did not raise the statutory maximum. *McMillan*, 477 U.S. at 87-88; *see also Schad* v. *Arizona*, 501 U.S. 624, 644 n.9 (1991) (characterizing *McMillan*'s holding as relying on fact that the statute in issue did not alter the maximum penalty); *Witte* v. *United States*, 515 U.S. 389, 401 (1995) (same).

Respondent correctly notes that the Court in *Monge* stated that the Court "has rejected an *absolute* rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed." Brief for United States, p. 37 (quoting *Monge*, 118 S. Ct. at 2250-2251) (emphasis added). But this dicta is properly read as simply noting that the Court in *Almendarez-Torres* established an exception to the rule for cases where the fact in issue relates to the prior criminal record of the defendant, not a circumstance of the charged offense.

The government also contends that the constitutional rule that a fact of an offense that increases the statutory maximum must be treated as an element of the offense is "anomalous in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty." Brief for United States, p. 44 (quoting *Almendarez-Torres*, 118 S.Ct. at 1232). But the Court has held only that, once a defendant has been convicted of a capital offense, a judge, rather than a jury, may determine the existence of "aggravating factors" in deciding whether a sentence of death or some lesser sentence is appropriate. *See Walton* v. *Arizona*, 497 U.S. 639 (1990); *Hildwin* v. *Florida*, 490 U.S. 638 (1989) (per curiam); *Spaziano* v. *Florida*, 468 U.S. 447 (1984). The Court has never permitted a judge to determine the existence of

v. *Wilbur*, 421 U.S. 684, 698 (1975); *Specht* v. *Patterson*, 386 U.S. 605 (1967).

Respondent contends that such a rule would still permit legislatures to circumvent the constitutional requirement that facts of the crime that increase the statutory maximum must be pleaded and proved at a jury trial simply by enacting new laws that establish a single general crime with a maximum penalty of life imprisonment, where the sentencing judge would determine whether certain facts of an offense justify an enhanced sentence within the statutory sentencing range. Brief for United States, pp. 46-47. However, such a statute is not before this Court and would raise other constitutional questions not applicable here. For example, mandatory "sentencing factors" in this type of statute might play such a significant role in determining the ultimate sentence that the Constitution would require that they be proved beyond a reasonable doubt. *See Almendarez-Torres*, 118 S. Ct. at 1230 ("we express no view on whether some heightened standard of proof might apply to sentencing determinations

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the fact of the offense that makes it a capital offense, *i.e.*, the fact that makes the defendant *eligible* for the death penalty. A defendant has a right to have that fact pleaded and proved beyond a reasonable doubt at a jury trial.

In any event, at the very least there are certainly strong doubts whether the carjacking statute would withstand constitutional scrutiny if serious bodily injury were construed to be merely a sentencing factor. Thus, under the doctrine of constitutional doubt, the Court must interpret the statute as requiring that serious bodily injury be treated as an element of the offense. *See Almendarez-Torres*, 118 S. Ct. at 1228 ("[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score") (quoting *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401 (1916)).

which bear significantly on the severity of sentence"); *Witte*, 515 U.S. at 403 ("Petitioner does not argue that the range fixed by Congress is so broad, and the enhancing role played by the relevant conduct so significant, that consideration of that conduct in sentencing has become 'a tail that wags the dog of the substantive offense.' " (quoting *McMillan*, 477 U.S. at 88).) Moreover, under this Court's analysis in *McMillan* and *Almendarez-Torres*, a statute of this type would fail constitutional scrutiny if the legislature "change[d] a pre-existing definition of a well-established crime" or gave other signs that it was attempting to " 'evade' the Constitution" by " 'restructuring' the elements of an offense." *Almendarez-Torres*, 118 S. Ct. at 1230, 1232 (citing *McMillan*, 477 U.S. at 89-90). Thus, the speculative scenario raised by respondent is not reason to reject the constitutionally compelled rule that a fact of an offense that raises the statutory maximum must be treated as an element of the offense. *See Patterson* v. *New York*, 432 U.S. 197, 211 (1977) (long-held rule that the prosecution must prove elements beyond a reasonable doubt while the burden of proving affirmative defenses may be placed on the defendant "did not lead to such abuses or to such wide-spread redefinition of crime and reduction of the prosecution's burden that a new constitutional rule was required").

CONCLUSION

When petitioner was arraigned, he was advised by the court that the maximum sentence he faced on the carjacking count was 15 years. Petitioner proceeded through plea negotiations, trial preparation and jury trial relying on that advice, only to be sentenced to a term of 20 years for the carjacking, one-third more than stated by the court. For the reasons stated herein and in the Brief for Petitioner, the judgment of the Court of Appeals should be reversed and the case remanded for resentencing, with a maximum punishment of 15 years on the carjacking count.

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